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No. 96-294

In the Supreme Court of the United States

OCTOBER TERM, 1996

LOUIS MARINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a sentencing court may consider conduct underlying a charge on which the jury was unable to reach a verdict.

2. Whether the Fifth or Sixth Amendment requires clear and convincing evidence to support a sentencing court's factual determinations underlying an upward adjustment in the defendant's Sentencing Guidelines sentencing range or an upward departure from that range.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Green v. *United States*, 355 U.S. 184 (1957)	7
McMillan v. *Pennsylvania*, 447 U.S. 79 (1986)	9, 11
Nicholas v. *United States*, 114 S. Ct. 1921 (1994)	8
Richardson v. *United States*, 468 U.S. 317 (1984)	7
United States v. *Alston*, 895 F.2d 1362 (11th Cir. 1990)	10
United States v. *Badaracco*, 954 F.2d 928 (3d Cir. 1992)	12
United States v. *Billingsley*, 978 F.2d 861 (5th Cir. 1992), cert. denied, 507 U.S. 1010 (1993)	11
United States v. *Black*, 78 F.3d 1 (1st Cir. 1996), cert. denied, No. 96-5500 (Oct. 7, 1996)	14
United States v. *Blanco*, 888 F.2d 907 (1st Cir. 1989)	9-10
United States v. *Carreon*, 11 F.3d 1225 (5th Cir. 1994)	11
United States v. *Carroll*, 893 F.2d 1502 (6th Cir. 1990)	10
United States v. *Casto*, 889 F.2d 562 (5th Cir. 1989), cert. denied, 493 U.S. 1092 (1990)	10
United States v. *Clark*, 84 F.3d 506 (1st Cir. 1996), cert. denied, No. 96-5776 (Oct. 7, 1996)	14
United States v. *Dix*, 77 F.3d 496 (11th Cir.), cert. denied, No. 95-8856 (Oct. 7, 1996)	14

Cases—Continued: Page

United States v. *Dunnigan*, 507 U.S. 87 (1993) 8
United States v. *Duran*, 15 F.3d 131 (9th Cir. Cir. 1994) 8
United States v. *Frederick*, 897 F.2d 490 (10th Cir.), cert. denied, 498 U.S. 863 (1990) 10
United States v. *Frierson*, 945 F.2d 650 (3d Cir. 1991), cert. denied, 503 U.S. 952 (1992) 10, 12
United States v. *Grayson*, 438 U.S. 41 (1978) 8
United States v. *Guerra*, 888 F.2d 247 (2d Cir. 1989), cert. denied, 494 U.S. 1090 (1990) 10
United States v. *Harrison-Philpot*, 978 F.2d 1520 (9th Cir. 1992), cert. denied, 508 U.S. 929 (1993) 11
United States v. *Ignancio Munio*, 909 F.2d 436 (11th Cir. 1990), cert. denied, 499 U.S. 938 (1991) 10
United States v. *Joetzki*, 952 F.2d 1090 (9th Cir. 1991) 10, 11
United States v. *Kikumura*, 918 F.2d 1084 (3d Cir. 1990) 10, 11
United States v. *Lam Kwong-Wah*, 966 F.2d 682 (D.C. Cir.), cert. denied, 506 U.S. 901 (1992) 9
United States v. *Lindia*, 82 F.3d 1154 (1st Cir. 1996) 14
United States v. *Lombard*, 72 F.3d 170 (1st Cir. 1995) 12, 13
United States v. *Masters*, 978 F.2d 281 (7th Cir. 1992), cert. denied, 508 U.S. 906 (1993) 10
United States v. *Mergerson*, 4 F.3d 337 (5th Cir. 1993), cert. denied, 510 U.S. 1198 (1994) 11
United States v. *Miele*, 989 F.2d 659 (3d Cir. 1993) 11
United States v. *Payne*, 940 F.2d 286 (8th Cir.), cert. denied, 502 U.S. 944 (1991) 10
United States v. *Pinkey*, 15 F.3d 825 (9th Cir. 1994) 7

Cases—Continued: Page

United States v. *Pointer*, 998 F.2d 1011 (4th Cir. 1993), cert. denied, 510 U.S. 1042 (1994) 14
United States v. *Restrepo*, 946 F.2d 654 (9th Cir. 1991), cert. denied, 503 U.S. 961 (1992) 11
United States v. *Reyes*, 930 F.2d 310 (3d Cir. 1991) 12
United States v. *St. Julian*, 922 F.2d 563 (10th Cir. 1990) 11
United States v. *Townley*, 929 F.2d 365 (8th Cir. 1991) 11
United States v. *Urrego-Linares*, 879 F.2d 1234 (4th Cir.), cert. denied, 493 U.S. 943 (1989) 10
United States v. *White*, 888 F.2d 490 (7th Cir. 1989) 10
Witte v. *United States*, 115 S. Ct. 2199 (1995) 8

Statutes and regulations:

18 U.S.C. 371 2
18 U.S.C. 1962(d) 2
26 U.S.C. 7206 2
Sentencing Guidelines:
§ 1B1.1 4
§ 1B1.3 ..... 4, 12
§ 2A1.1 5
§ 2A1.5 4
§ 2E1.1 ..... 3, 12
§ 3C1.1 3
§ 3D1.4 ..... 3, 5, 14
§ 5K2.8 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 78 F.3d 294. The opinion of the district court (Pet. App. C1-C99) is reported at 835 F. Supp. 1501.

JURISDICTION

The judgment of the court of appeals (Pet. App. A18) was entered on March 1, 1996. A petition for rehearing was denied on May 23, 1996. Pet. App. B1. The petition for a writ of certiorari was filed on August 20, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner

was convicted on one count of conspiracy to commit racketeering, in violation of 18 U.S.C. 1962(d); one count of conspiracy to conduct an illegal gambling enterprise, in violation of 18 U.S.C. 371; and one count of submitting a false and fraudulent tax return, in violation of 26 U.S.C. 7206. Petitioner was sentenced to a total of 28 years' imprisonment. The court of appeals affirmed. Pet. App. A1-A17.

1. Petitioner and his co-defendants were members of the Ferriola Street Crew, an operating unit of an organized crime operation known as the "Chicago Outfit." There was "overwhelming" evidence that, in furtherance of organized crime operations, the Ferriola Street Crew ran illegal gambling businesses, engaged in loan sharking, bribed public officials, suborned jurors, and collected protection payments ("street tax") from brothels, gambling enterprises, and other illegal businesses. Pet. App. A2, C5. The government also presented evidence at trial that several members of the Ferriola Street Crew, including petitioner, took part in the murder of Hal Smith, a bookmaker who had refused to pay the "street tax" demanded by the Crew. *Id.* at A2.

Petitioner was convicted on one count of racketeering conspiracy, one count of gambling conspiracy, and one count of filing a false tax return. The jury was unable to reach a verdict on two counts that charged petitioner with conspiring to murder and murdering Hal Smith. On the racketeering conspiracy count, the jury also was unable to reach a verdict as to two predicate racketeering acts charging petitioner with

conspiring to murder and murdering Smith.[1] Pet. App. C1 & n.3.

2. The Probation Office prepared a Presentence Report (PSR) that assigned petitioner a total adjusted offense level of 28 under the Sentencing Guidelines.[2] Pet. App. C32. The government and petitioner filed objections to the PSR, which the district court addressed in a comprehensive opinion issued before sentencing. *Id.* at C1-C99. The district court found that petitioner's total adjusted offense level was 43, *id.* at C98, and sentenced him to 28 years' imprisonment, *id.* at D39.

a. The district court first concluded that petitioner should receive a one-point enhancement (to 29) for obstruction of justice pursuant to Sentencing Guidelines § 3C1.1. Pet. App. C32-C46. The government argued that the enhancement was warranted because petitioner participated in the murder of Hal Smith, whom the Crew believed was a government informant. *Id.* at C32. The district court found that the government had established by a preponderance of

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[1] The jury found that petitioner had committed nine other predicate racketeering acts, including collecting unlawful debts, extortion, and running illegal sports gambling and parlay card bookmaking operations. Pet. App. C1 & n.2.

[2] The PSR calculated the adjusted offense level at 28 as follows. First, pursuant to Sentencing Guidelines § 2E1.1, the PSR calculated offense levels for all of the nine predicate racketeering acts of which petitioner was found guilty in connection with the RICO conspiracy charge, and assigned petitioner the offense level applicable to the greatest of those offense levels, which was 23. PSR at 4-13. Next, the PSR calculated a combined offense level for the counts, pursuant to Guidelines § 3D1.4. That calculation resulted in the addition of five levels—the maximum provided for in Guidelines § 3D1.4—for a final offense level of 28. PSR at 13-14.

the evidence that petitioner participated in Smith's murder, but it also found the evidence insufficient to support a conclusion that the murder was committed to obstruct the government's investigation of the Crew. *Id.* at C38-C39. Instead, the court based the Section 3C1.1 enhancement on petitioner's payment of "hush money" to a Crew member and on petitioner's involvement in obtaining police protection for a prostitution business. *Id.* at C39-C46.

b. The district court then determined that petitioner's offense level should be raised further to 43, for three independent reasons. First, the court concluded that petitioner's involvement in Smith's murder was "relevant conduct," within the meaning of Guidelines §§ 1B1.1 and 1B1.3, which (taken together) required the court to sentence petitioner based on "the offense of conviction and all relevant conduct," including all acts that were committed "during the commission of the offense of conviction, in preparation for that offense * * * or * * * in furtherance of that offense." See Pet. App. C50 (emphasis omitted); Guidelines § 1B1.1, Application Note 1(1); Guidelines § 1B1.3. The court found specifically that the government had proven, by a preponderance of the evidence, that "Marino was part of the conspiracy to murder Hal Smith and Smith's murder was part of the plan of the RICO conspiracy of which [petitioner] was found guilty." Pet. App. C52. The court also noted that petitioner had acknowledged that the preponderance of the evidence is "the standard of proof governing upward departures." *Id.* at C50 n.28. Accordingly, the court increased petitioner's offense level to 43, because that is the offense level supplied by Guidelines § 2A1.5, the Guideline

applicable to conspiracy to commit murder.[3] Pet. App. C59-C60.

Second, the court determined that an upward departure from petitioner's Guidelines sentencing range was warranted because "the guidelines applicable to [petitioner]'s participation in the charged RICO conspiracy d[id] not adequately account for his involvement in Smith's murder." Pet. App. C52. The court found that a departure up to level 43 was appropriate "because the circumstances surrounding Smith's death demonstrate that this offense is comparable to first degree murder." *Ibid.* The court also noted that an upward departure was supported by Guidelines § 5K2.8, addressing conduct that is "unusually heinous, cruel, brutal, or degrading to the victim," because the evidence showed that Smith had been brutally tortured. Pet. App. C53-C54 n.29.

Third, the court concluded that an upward departure from the Guidelines sentencing range was independently warranted on the basis of Guidelines § 3D1.4, which permits such a departure when the adjustment required by that Guideline for combined offenses yields a sentencing range that is clearly inadequate. Pet. App. C58 n.33. The court found that petitioner had committed such a large number of underlying offenses that the greatest adjustment possible under Guidelines § 3D1.4 did not produce an adequate upward adjustment. *Ibid.*

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[3] Guidelines § 2A1.5 supplies a base offense level of 28 for the offense of conspiracy to commit murder. Section 2A1.5 directs the court to apply the first-degree murder provision, Guidelines § 2A1.1, if the conspiracy resulted in the death of the victim. In turn, Guidelines § 2A1.1 supplies a base offense level of 43.

3. The court of appeals affirmed petitioner's conviction and sentence. Pet. App. A1-A17. The court rejected petitioner's contention that the district court had "usurped the jury's function" by sentencing petitioner based on a finding that petitioner was involved in Smith's murder, notwithstanding the jury's inability to reach a verdict on the murder charges in the indictment. *Id.* at A14. The court noted that the jury was asked to decide whether petitioner was guilty beyond a reasonable doubt, whereas at sentencing, the government was required to prove petitioner's participation in the murder only by a preponderance of the evidence. Thus, the court concluded, "the failure of the proof to satisfy the first standard doesn't show that it fails to satisfy the second." *Ibid.*[4]

ARGUMENT

1. Petitioner contends that the district court's consideration, at sentencing, of his participation in Smith's murder deprived him of his right to have his guilt determined by a jury beyond a reasonable doubt. See Pet. 5-14. He argues that the jury "effectively acquitted" him of any responsibility for Smith's murder, Pet. 5 (emphasis omitted), and that the court was therefore forbidden to take that "acquitted conduct" (*ibid.*) into account when determining his sentence. Petitioner's contention does not warrant further review.

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[4] The court of appeals acknowledged that two members of the Seventh Circuit had expressed "tentative support for requiring" proof by clear and convincing evidence of facts presented at sentencing "in justification of a markedly higher sentence." Pet. App. A15. It noted, however, that that was "neither the present view of a majority of the judges nor a position urged by the defendants in this case." *Ibid.*

Petitioner's claim fails at the threshold, because he was not acquitted of any charge. The jury at petitioner's trial was unable to reach a verdict on the counts charging him with murdering, and conspiring to murder, Hal Smith. A hung jury, however, is not equivalent to an acquittal, and the government would have been permitted to retry petitioner on the charges relating to Smith's murder. See *Richardson* v. *United States*, 468 U.S. 317, 325 (1984).

Petitioner's reliance (Pet. 5 n.3) on *Green* v. *United States*, 355 U.S. 184, 190 (1957), is unavailing. In that case, the jury was authorized to find the defendant guilty of either first-degree or second-degree murder, in the alternative, and it found him guilty of second-degree murder. Under those circumstances, the Court concluded that the defendant was "implicit[ly] acquitt[ed]" of the greater charge because the jury returned a guilty verdict on the lesser-included offense. *Ibid.* Because the jury did not convict petitioner on a lesser-included charge, the jury's inability to reach a verdict on the murder and murder conspiracy counts was not an implicit acquittal on those charges.

Because petitioner was not acquitted of murder or conspiracy to murder, there is no reason to hold the petition in this case for *United States* v. *Watts*, petition for cert. pending, No. 95-1906. The petition in *Watts* presents the question whether a court, in imposing sentence for the offense of conviction, may consider conduct underlying a charge of which the defendant was acquitted. The circuits are divided on that question, with the Ninth Circuit standing alone in the view that "acquitted conduct" may not be considered in sentencing a defendant for an offense of which he was convicted. See *United States* v.

Pinkney, 15 F.3d 825 (9th Cir. 1994); 95-1906 Pet. at 8-9 & n.2 (citing cases). Even the Ninth Circuit has held, however, that conduct underlying a charge as to which a jury failed to reach a verdict may be considered, when relevant, in sentencing a defendant for the offense of conviction. See *United States* v. *Duran*, 15 F.3d 131, 133 (9th Cir. 1994) (per curiam) (notwithstanding Ninth Circuit's bar on use of acquitted conduct at sentencing, "the district court is * * * free to consider facts relating to" a charge as to which jury failed to reach a verdict). Because petitioner's sentence was not based on any conduct underlying a charge on which he was acquitted, the disposition of *Watts* will not affect this case.

In any event, petitioner's argument is without merit, for it rests on the erroneous premise that his sentence was a punishment for a crime of which he was not convicted. This Court has consistently held that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." *Witte* v. *United States*, 115 S. Ct. 2199, 2207 (1995); see also *id.* at 2207-2208 ("the offender is * * * punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment, not for a *different* offense"); *Nichols* v. *United States*, 114 S. Ct. 1921, 1927 (1994) ("Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction;" they "penal[ize] only the last offense committed by the defendant"). Thus, the Court has held that a court may constitutionally

consider the defendant's perjury at trial in sentencing him for the offense of conviction, see *United States* v. *Dunnigan*, 507 U.S. 87 (1993); *United States* v. *Grayson*, 438 U.S. 41 (1978), and has rejected the contention that such a practice amounts to "punishment for the crime of perjury for which he has not been indicted, tried, or convicted by due process," *id.* at 52. The same conclusion applies here: the district court was permitted to consider petitioner's relevant conduct, including his role in the murder of Smith that was part of the racketeering conspiracy, when sentencing him for participating in that conspiracy, even though the jury had not found him guilty of murder.

2. a. Petitioner also contends (Pet. 14-24) that, even if the sentencing court was permitted to consider his participation in the conspiracy to murder Smith, it was required by due process principles to use a more stringent standard than the preponderance of the evidence when determining that he was involved in that conspiracy and murder. That argument is foreclosed by *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). In *McMillan*, the Court "ha[d] little difficulty concluding that * * * the preponderance [of the evidence] standard satisfies due process" as applied to sentencing proceedings. *Id.* at 91. The Court noted there that "[s]entencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment," and that it had "consistently approved sentencing schemes that mandate consideration of facts related to the crime, without suggesting that those facts must be proved beyond a reasonable doubt." *Id.* at 92. In accordance with *McMillan*, every court of appeals that has considered the issue has held that the preponderance of the evidence

standard is generally sufficient for making factual findings underlying sentencing determinations.[5] The court of appeals in this case correctly reached the same conclusion. Pet. App. A14-A15.

As petitioner points out (Pet. 19), the Third Circuit in *United States* v. *Kikumura*, 918 F.2d 1084 (1990), departed from the rule that sentencing findings may always be based on a preponderance of the evidence. In *Kikumura*, the sentencing court departed upward from the Guidelines sentencing range of 27-33 months' imprisonment, and imposed a sentence of 30 years' imprisonment. That twelve-fold increase was based on the court's finding that the defendant's offense of conviction was part of a larger, uncharged scheme to commit terrorist acts. *Id.* at 1098-1102.

In *Kikumura*, the Third Circuit held that, in light of the exceptional magnitude of the departure, the

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[5] See, *e.g.*, *United States* v. *Lam Kwong-Wah*, 966 F.2d 682, 685-686 (D.C. Cir.), cert. denied, 506 U.S. 901 (1992); *United States* v. *Blanco*, 888 F.2d 907, 909 (1st Cir. 1989); *United States* v. *Guerra*, 888 F.2d 247, 250-251 (2d Cir. 1989), cert. denied, 494 U.S. 1090 (1990); *United States* v. *Frierson*, 945 F.2d 650, 652 (3d Cir. 1991), cert. denied, 503 U.S. 952 (1992); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-1238 (4th Cir.), cert. denied, 493 U.S. 943 (1989); *United States* v. *Casto*, 889 F.2d 562, 569-570 (5th Cir. 1989), cert. denied, 493 U.S. 1092 (1990); *United States* v. *Carroll*, 893 F.2d 1502, 1506 (6th Cir. 1990); *United States* v. *Masters*, 978 F.2d 281, 286-287 (7th Cir. 1992), cert. denied, 508 U.S. 906 (1993); *United States* v. *White*, 888 F.2d 490, 499 (7th Cir. 1989); *United States* v. *Payne*, 940 F.2d 286, 292 (8th Cir.), cert. denied, 502 U.S. 944 (1991); *United States* v. *Joetzki*, 952 F.2d 1090, 1096 (9th Cir. 1991); *United States* v. *Frederick*, 897 F.2d 490, 491-493 (10th Cir.), cert. denied, 498 U.S. 863 (1990); *United States* v. *Ignancio Munio*, 909 F.2d 436, 439 (11th Cir. 1990), cert. denied, 499 U.S. 938 (1991); *United States* v. *Alston*, 895 F.2d 1362, 1372-1373 (11th Cir. 1990).

facts underlying the departure had to be proved by clear and convincing evidence. That heightened standard was necessary, in the court of appeals' view, in a case where "the magnitude of a proposed departure dwarfs the guideline range applicable to the substantive offense of conviction," 918 F.2d at 1089, to prevent the departure from becoming the "tail which wags the dog of the substantive offense," *id.* at 1101 (quoting *McMillan*, 477 U.S. at 88). The court stressed that the heightened standard of proof was necessary because of the "extreme situation[]" in that case (918 F.2d at 1100), involving "the largest departure from an applicable guideline range * * * since the sentencing guidelines became effective" (*id.* at 1089).

Kikumura has not been followed by any other circuit,[6] and the Third Circuit itself subsequently made clear that *Kikumura* applies only in extraordinary situations. See, *e.g.*, *United States* v. *Miele*,

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[6] The Fifth, Eighth, and Ninth Circuits have reserved the question whether they would follow *Kikumura* in an exceptional case. See *United States* v. *Mergerson*, 4 F.3d 337, 343-345 (5th Cir. 1993), cert. denied, 510 U.S. 1198 (1994); *United States* v. *Billingsley*, 978 F.2d 861, 865-866 (5th Cir. 1992), cert. denied, 507 U.S. 1010 (1993); *United States* v. *Restrepo*, 946 F.2d 654, 661 n.12 (9th Cir. 1991) (en banc), cert. denied, 503 U.S. 961 (1992); *United States* v. *Harrison-Philpot*, 978 F.2d 1520, 1523-1524 (9th Cir. 1992), cert. denied, 508 U.S. 929 (1993); *United States* v. *Townley*, 929 F.2d 365, 369-370 (8th Cir. 1991). The courts in *Mergerson*, *Restrepo*, and *Townley* applied the preponderance standard, as have successor panels. See, *e.g.*, *United States* v. *Carreon*, 11 F.3d 1225, 1240 (5th Cir. 1994); *United States* v. *Joetzki*, 952 F.2d at 1096; *United States* v. *Payne*, 940 F.2d at 292. The Tenth Circuit has referred favorably to *Kikumura* in dictum in a case in which the issue was not presented. See *United States* v. *St. Julian*, 922 F.2d 563, 568 n.1 (1990).

989 F.2d 659, 663 n.3 (1993). Specifically, since *Kikumura*, the Third Circuit has held that sentencing courts should use the preponderance of the evidence standard in determining the applicability of specific offense characteristics and adjustments under the Guidelines. See *United States* v. *Badaracco*, 954 F.2d 928, 935 (1992); *United States* v. *Frierson*, 945 F.2d 650, 652 (1991), cert. denied, 503 U.S. 952 (1992); *United States* v. *Reyes*, 930 F.2d 310, 315 (1991).

This case does not present the "extreme situation" present in *Kikumura*. Under petitioner's calculation (see Pet. 4), his Guidelines sentencing range should be 87-108 months' imprisonment (the range corresponding to offense level 29 and Criminal History Category I). The 28-year sentence imposed by the district court thus represents just over a three-fold increase over the sentence that petitioner concedes to be appropriate. That increase is of an entirely different order of magnitude than the twelve-fold increase at issue in *Kikumura*. Furthermore, although the district court found in this case (as in *Kikumura*) that an upward departure from the Guidelines sentencing range was warranted, it also based petitioner's sentence independently on an adjustment to that sentencing range, as required by Guidelines § 1B1.3 and Guidelines § 2E1.1. That factor was not present in *Kikumura*, and it is not clear that the Third Circuit would require clear and convincing evidence in a case not involving an upward departure from a Guidelines sentencing range.

In arguing that a preponderance of the evidence standard violates due process, petitioner also relies (Pet. 17-19) on *United States* v. *Lombard*, 72 F.3d 170 (1st Cir. 1995), but that case does not assist him. In *Lombard*, the defendant had been acquitted of state

murder charges, but was subsequently convicted on federal firearms charges. 72 F.3d at 172. At sentencing, the district court found that the defendant had used a firearm to commit the very murders of which he had been acquitted in state court. The resulting Guidelines sentence was a mandatory term of life imprisonment instead of 262-327 months' imprisonment. *Id.* at 174-175 & n.6. On those facts, after characterizing the case as one in which "the tail has wagged the dog," *id.* at 177, the court of appeals held that the district court had authority to depart downward. *Id.* at 184. In reaching that conclusion, the *Lombard* court relied on the unique combination of factors involved in that case, including the state court acquittal, the magnitude of the enhancement, the seriousness of the enhancing conduct compared to the offense of conviction, and the mandatory life sentence. *Id.* at 180-186. The court emphasized that "this is an extreme case," and that "no comparable concerns would be raised by cases involving even sizable sentence increases based on uncharged [conduct]." *Id.* at 186.

The present case is notably different from *Lombard*. Petitioner was not sentenced based on any conduct of which he had been acquitted. Nor was he sentenced to life imprisonment (as he could have been upon conviction of murder or conspiracy to commit murder), and so the murder was not "treated as the gravamen of the offense," as had been the case in *Lombard*. See 72 F.3d at 178.

In any event, *Lombard* addressed a court's authority to depart from the Guidelines range; it did not address the standard of proof issue raised by petitioner. Indeed, *Lombard* observed that a sentencing court finds facts under the preponderance of the

evidence standard, and that a defendant has no due process right to sentencing under a higher standard of proof. 72 F.3d at 175-176. The First Circuit continues to adhere to the preponderance standard for sentencing determinations, and has cited *Lombard* as authority for that adherence. See *United States* v. *Clark*, 84 F.3d 506, 509 (1st Cir. 1996), cert. denied, No. 96-5776 (Oct. 7, 1996); *United States* v. *Lindia*, 82 F.3d 1154, 1161 (1st Cir. 1996); *United States* v. *Black*, 78 F.3d 1, 4 (1st Cir. 1996), cert. denied, No. 96-5500 (Oct. 7, 1996). Accordingly, *Lombard* is inapposite here.

b. This Court has on several occasions denied review of the issue presented by petitioner. See *United States* v. *Dix*, 77 F.3d 496 (11th Cir.) (Table), cert. denied, No. 95-8856 (Oct. 7, 1996); *United States* v. *Pointer*, 998 F.2d 1011 (4th Cir. 1993) (Table), cert. denied, 510 U.S. 1042 (1994). There is no reason for a different result in this case. In any event, this case would be an inappropriate vehicle for deciding whether the Constitution ever requires that facts relevant to sentencing be found by a standard of proof higher than a preponderance of the evidence. Not only did petitioner fail to raise that issue in either of the courts below, see Pet. App. A15, C50 n.28, but a favorable resolution of it to petitioner would be of no assistance to him. The district court in this case also held that an upward departure was warranted on a ground that did not depend on a finding that petitioner had participated in Smith's murder. The district court found that the calculation of petitioner's combined offense level pursuant to Guidelines § 3D1.4 produced an inadequate upward adjustment in petitioner's Guidelines range. See Pet. App. C58 n.33. That conclusion was based on the fact that petitioner

had participated in so many offenses that the Guidelines' instructions for upward adjustments based on combined offenses did not adequately reflect the seriousness of petitioner's underlying conduct. *Ibid.* Thus, petitioner likely would have received the same sentence, even if the district court had not considered his involvement in Smith's murder.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1996